UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, Plaintiff, v. Tyson Foods, Inc., et al., Defendants.	05-CV-0329 GKF-PJC **DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING INABILITY OF EXPERTS TO OFFER INADMISSIBLE FACTS AS OPINION EVIDENCE**

In anticipation that the State will attempt to offer expert testimony in the form of otherwise inadmissible facts or summaries of other experts' opinions, Defendants offer the following discussion of the bounds of admission allowed by Federal Rules of Evidence 701, 703, and 611(a). As with most evidentiary rules, application of this expert opinion analysis will depend on the specifics of testimony and exhibits offered. Defendants present this submission to provide a context for Defendants' possible objections and/or requests for voir dire when and if the State seeks to offer improper expert testimony.

DISCUSSION

Experts may offer an opinion on an issue of "scientific, technical, or other specialized knowledge" only if the knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. In turn, Rule 703 describes the permissible bases for expert opinion testimony allowable under Rule 702. It contains three demands. First,

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.

Fed. R. Evid. 703. Second,

> If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

Id. And, third,

> **Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.**

Id. (emphasis added). Rule 703 applies when the trial is to the bench. E.g., Slicex, Inc. v. Aeroflex Colo. Springs, Inc., 2006 U.S. Dist. LEXIS 46775, at *6-7, 11 n.35 (D. Utah July 11, 2006) (citing In re Breast Implant Litig., 11 F. Supp. 2d 1217, 1222 (D. Colo. 1998)).

Rule 703 "does not afford the expert unlimited license to testify ... without first relating that testimony to some 'specialized knowledge' on the expert's part as required under Rule 702." United States v. Johnson, 54 F.3d 1150, 1157 (4th Cir. 1995) (relied upon by Tenth Circuit in United States v. Ray, 370 F.3d 1039 (10th Cir. 2004), discussed below). Finally, if the State satisfies these burdens and "[i]f the otherwise inadmissible information is admitted under th[e] balancing test, the trial judge must give a limiting instruction … that the underlying information must not be used for substantive purposes." Fed. R. Evid. 703, advisory committee notes (2000).

A. The Strictly Circumscribed Limits on Hearsay in Expert Testimony.

After Rule 703 was substantively amended effective December 2000, the Tenth Circuit recognized that the third portion of Rule 703 – bolded above – overruled prior Tenth Circuit precedent. Black v. M & W Gear Co., 269 F.3d 1220, 1228 n.3 (10th Cir. 2001). Specifically, in 1999 the Tenth Circuit upheld an expert's testimony concerning documents that could not be admitted into evidence because they were not authenticated to demonstrate the basis for his expert opinion, explaining that "experts in the field can be presumed to know what evidence is sufficiently trustworthy and probative to merit reliance." Id. (comparing Kinser v. Gehl Co., 184

F.3d 1259, 1274-75, 1279 (10th Cir. 1999), with Fed. R. Evid. 703 (2000)). Black explains that pre-amendment Tenth Circuit precedent had adopted the analysis articulated in the treatise Federal Practice & Procedure that experts should be allowed not only to base their opinion on qualifying inadmissible evidence, but that they also should be allowed "to testify concerning the content of the inadmissible evidence, if the evidence is inadmissible only because of relevance or reliability concerns," but that the new language in Rule 703 "overrules [this] prior circuit precedent." Id. at 1228-29 & n.3 (discussing Kinser, 184 F.3d at 1275, and Wright & Gold, Fed. Prac. & Procedure § 6273, at 311-21 (1997)).[1]

Rule 703 does not permit wholesale admissibility of otherwise inadmissible and/or hearsay evidence. Indeed, the Rule "provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and [is] not admissible for any substantive purpose, when that information is offered by the proponent of the expert." Fed. R. Evid. 703, advisory committee notes (2000). As such, "when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted." Id. Instead, the proponent of the expert must satisfy a number of foundational requirements before the otherwise inadmissible materials could be presented for the limited purpose of explaining the expert opinion. See Fed. R. Evid. 703.

Thus, the Tenth Circuit found that the Western District of Oklahoma erred in allowing an expert to testify "concerning his conversation with the on-scene fire investigator," because the conversation "constituted hearsay to which no exception applied. Therefore, it was inadmissible under Rule 703 unless the court concluded its probative value substantially outweighed its prejudicial effect," which evaluation the court did not conduct. United States v. Ward, 182 Fed.

[1] The Black court did not apply the new standard in Rule 703 in that case, finding that the Rule did not apply retroactively. 269 F.3d at 1228 n.3.

Appx. 779, 793 (10th Cir. 2006) (unpublished, finding error harmless because objection was not raised at trial). On the other hand, the Tenth Circuit upheld the same expert's testimony regarding a company report the expert relied upon in rendering his opinion because the report was independently admissible under the business records exception to the hearsay rule. Id. (citing Fed. R. Evid. 803(6)).[2] See also, e.g., United States v. Steed, 548 F.3d 961, 975 (11th Cir. 2008) ("Rule 703 ... is not an open door to all inadmissible evidence disguised as expert opinion"); Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 703 (7th Cir. 2008) ("a judge must take care that the expert is not being used as a vehicle for circumventing the rule against hearsay").

Similarly, the District of New Mexico has applied amended Rule 703 to find that while the Rule "allows an expert to rely on inadmissible facts in reaching an opinion or inference, **[Rule 703] does not allow the proponent of the expert testimony to use the expert as a conduit for a party to get in otherwise inadmissible evidence** …" Vondrak v. City of Las Cruces, 2007 U.S. Dist. LEXIS 55677, *11-12 n.4 (D.N.M. May 14, 2007) (emphasis added). Thus, the court refused to consider on summary judgment portions of an expert's report discussing inadmissible hearsay statements. Id. Put slightly differently by the District of Colorado, Rule 703 "provides that an expert witness may not disclose to the jury any inadmissible facts or data he relied upon without prior court approval," but the expert's "conclusions and findings based on" hearsay may be admissible if the Court determines they

[2] Cf. United States v. Sinks, 473 F.3d 1315, 1322 (10th Cir. 2007) (without mentioning the amended portion of Rule 703 requiring courts to balance the probative value of otherwise inadmissible evidence before admitting it, the court found that it could not determine on the record whether the trial court erred in admitting expert testimony based on hearsay since the complaining party did not object or cross-examine the expert on the basis of his opinion at trial) (relying on United States v. McPhilomy, 270 F.3d 1302, 1313-14 (10th Cir. 2001), a pre-Rule 703 amendment case published just two days after Black and authored by a different panel of Tenth Circuit judges, and which does not mention the amended language in Rule 703).

satisfy Rule 702 and all provisions in Rule 703. Cook v. Rockwell Int'l Corp., 580 F. Supp. 2d 1071, 1132 (D. Colo. 2006).

In addition, the Tenth Circuit has long held that "it is well established that medical textbooks, treatises and professional articles are not freely admissible in evidence to prove the substantive or testimonial facts stated therein, since they are subject to the hearsay rule." Hickok v. G. D. Searle & Co., 496 F.2d 444, 446-47 (10th Cir. 1974) (citations to precedent and treatises omitted). The Tenth Circuit mandates that expert witnesses are allowed to testify to hearsay matters by reference to published materials "solely to establish the basis for the expert's opinion, and not to establish the veracity of the hearsay matters themselves. " Id. at 447 (citations omitted). Further, "[w]here testimony as to hearsay is received for such a limited purpose, its effect is to be carefully controlled by the trial judge, including the giving of limiting instructions to the jury." Id. (citation omitted). Applying these rules, the Hickok court found that the trial court was "eminently correct" in excluding expert testimony about a newly published article as impermissible hearsay after perceiving that the plaintiff's principal interest in eliciting the expert testimony was to bring before the factfinder testimony as to the substantive content of the article. Id.; see also, e.g., Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co., 2006 U.S. Dist. LEXIS 13429, at *16 n.2 (D. Utah Mar. 10, 2006), reversed on other grounds, 491 F.3d 1180 (10th Cir. 2007) ("A statement in a magazine article is clearly an out-of-court statement used to prove the truth of the facts asserted in it."). [3]

[3] The learned treatise hearsay exception in Rule 803(18) is outside the scope of this submission. However, it is worth noting that the State must establish a proper foundation for admission of any purported learned treatise: "It is not enough that the journal in which it appeared was reputable; the author of the particular article had to be shown to be an authority before the article could be used consistently with Fed. R. Evid. 803(18)." Twin City Fire Ins. Co v. Country Mut. Ins. Co., 23 F.3d 1175, 1184 (7th Cir. 1994). A proper foundation requires, among other things, that the sponsoring expert witness establish that he/she recognizes it as a reliable authority in the

B. Differences Between Allowable Rule 701 Lay Opinions and Allowable Bases for Expert Opinions Under Rules 702 and 703.

"When the subject matter of proffered testimony constitutes 'scientific, technical, or other specialized knowledge,' the witness must be qualified as an expert." Lifewise Master Funding v. Telebank, 374 F.3d 917, 929 (10th Cir. 2004); Fed. R. Evid. 702. In contrast, a Rule 701 lay opinion regards a personal perception and "do[es] not require any specialized knowledge and could be reached by any ordinary person." Lifewise, 374 F.3d at 929. Rule 703, which only applies to bases of opinion testimony by experts, does not apply to fact-based lay opinions because pure facts are not a subject matter that requires scientific, technical, or other specialized knowledge.[4] See Fed. R. Evid. 701 (precluding lay opinion testimony on any matter requiring scientific or other specialized knowledge). Hence, Rule 703 does not allow an expert to offer fact-based perceptions of third parties into evidence simply because the expert may have relied upon the perceptions in formulating expert opinions.

Lay opinions – unlike expert opinions – cannot be based on hearsay. See United States v. Garcia, 994 F.2d 1499, 1506 (10th Cir. 1993) ("In order for a lay opinion to be 'rationally based on the perception of a witness,' the witness must have 'first hand knowledge' of the events to which he is testifying."); see also Vesom v. Atchison Hosp. Ass'n, 279 Fed. Appx. 624, 634 (10th Cir. 2008) (noting that lay opinion witness "fail[ed] to present personally observed statements or conduct as the basis for his opinion") (unpublished); United States v. Freeman, 498 F.3d 893, 905 (9th Cir. 2007) (noting that lay opinions must be based on "direct perception of the

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field and that he/she relied on it as authority to corroborate his or her opinions. See Graham v. Wyeth Lab., 906 F.2d 1399, 1412 (10th Cir. 1990); Dartez v. Fireboard Corp., 765 F.2d 456, 465 (5th Cir. 1985). If the State satisfies these burdens, the expert is nonetheless limited to reading only applicable portions of the publications into evidence. See Fed. R. Evid. 803(18).

[4] Defendants submit that whether someone witnessed what he perceived to be the land application of poultry litter is fact-based testimony governed by Rule 701, not Rule 703.

event"); United States v. Elekwachi, 111 F.3d 139, 197 WL 174160, at *3 (9th Cir. 1997) ("Only an expert witness is permitted to rely upon hearsay evidence in formulating her opinions. Testimony of a lay witness must be based upon the witness' own perception.") (citations omitted, unpublished).

Instead, the admissibility of such fact-based testimony is determined by the witness' personal knowledge of the event. See Fed. R. Evid. 602 ("A witness may not testify to a matter unless the evidence is introduced sufficient to support a finding that the witness had personal knowledge of the matter."); Garcia, F.2d at 1506-07 (noting that the limitations on Rule 701 lay opinions are derived in part from Rule 602). Absent first-hand, personal knowledge of the event of the subject perception, the lay opinion regarding a factual event is necessarily based on an inadmissible hearsay. See Fed. R. Evid. 801(c).[5]

C. The Narrow Circumstances in the Tenth Circuit Where Summary Expert Testimony Is Admissible.

Federal courts across the country have remarked about the difficulty of squaring Rule 703 with Rule 611(a), which grants courts the power to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to ... make the interrogation and presentation effective for the ascertainment of the truth," and which provision is generally

[5] By way of example, the State has elicited this type of lay opinion evidence from Dr. Fisher at trial: "Dr. Fisher, do you know whether or not poultry litter had been applied to this field?" Oct. 8, 2009 Trial Tr. at 1631. This question did not call for the use of any specialized knowledge or expertise, but inquired into a factual event that any person could perceive were he present at the time. Notably, in response Dr. Fisher conceded that his information was based on the reports of the off-duty police officers. Id. at 1632. Dr. Fisher was not present at the time of the alleged application; he did not observe litter being applied on the subject pasture and he could not have first-hand knowledge of the purported spreading event.

Plaintiffs effectively conceded that the investigators should testify to their perceptions regarding alleged spreading events. See id. at 1630 ("Your honor, we could – we could take about a week and bring in all the investigators and have them identify – but I just wanted to tell you –").

regarded as allowing some forms of summary testimony. In the Tenth Circuit, a multi-step analysis has emerged.

First, "a party may only admit summary testimony under Fed. R. Evid. 611(a) if the District Court previously admitted at trial the evidence that forms the basis of the summary." United States v. Stiger, 413 F.3d 1185, 1198 (10th Cir. 2005) (citing United States v. Ray, 370 F.3d 1039 (10th Cir. 2004), sentencing vacated by United States v. Booker, 543 U.S. 220 (2005), but reinstated on all other grounds at United States v. Ray, 147 Fed. App'x 32, 34 (10th Cir. 2005)). As a threshold matter, a trial court within the Tenth Circuit may not permit an expert to offer summary testimony about other experts' opinions that have not yet been admitted into the trial record.

Second, "[a]lthough Fed. R. Evid. 703 allows an expert witness to base his conclusions on previous testimony, it does not afford the expert unlimited license to testify or present a chart in a manner that simply summarizes the testimony of others without first relating that testimony to some 'specialized knowledge' on the expert's part as required under Rule 702." Ray, 370 F.3d at 1046 (quoting United States v. Johnson, 54 F.3d 1150, 1157 (4th Cir. 1995)); accord, e.g., United States v. Flores-de-Jesus, 569 F.3d 8, 20 (1st Cir. 2009). "Thus, as with any other witness, courts cannot allow an overview witness to testify as an 'expert' as to matters that are not appropriately the subject of expert testimony." Flores-de-Jesus, 569 F.3d at 20. If an expert cannot satisfy this rule, his summary testimony is not admissible via Rule 703.

In Ray, the government plaintiff offered expert testimony and exhibits at the close of its case-in-chief that provided the jury with a summary of the previous testimony presented at trial. 370 F.3d at 1045. The Tenth Circuit determined that the expert did not rely upon specialized knowledge in providing his testimony; hence, Rule 703 did not allow for the admission of the

experts' summaries. Id. at 1046. In addition, the court found that Rule 1006 did not apply because the summarizing exhibits relied largely on previous testimony rather than "the contents of voluminous writings, recordings, or photographs." Id. (citing Fed. R. Evid. 1006; Johnson, 54 F.3d at 1158).

However, even where summary testimony of evidence already in the record does not qualify for admission pursuant to either Rule 703 or 1006, the Tenth Circuit held that Rule 611(a) grants trial courts the power to allow expert summaries of admitted evidence, but **only** if two preconditions are met. First, "the summary chart or testimony [must] aid … in ascertaining the truth." Id. (quoting Johnson, 54 F.3d at 1159). Under this prong, the Court should consider things like "the length of the trial, the complexity of the case, and the accompanying confusion that a large number of witnesses and exhibits may generate for the jury." Id. at 1046-47. In Ray, the Tenth Circuit found that a 23-day trial with over 50 witnesses "testifying to a large number of complex and understandably confusing transactions" satisfied this first prong of the Rule 611(a) test. Id. at 1047. Second, the trial court should consider the prejudice to the defendant in allowing such evidence. Id. The Ray court found that the second prong was satisfied where the defendant's counsel had "sufficient opportunity to challenge the veracity of the charts and testimony through cross examination and objection" and the court gave a limiting instruction to the jury. Id.

The Ray court stressed that in the "ordinary" case, "neither a summary witness's testimony nor a summary chart of the sort discussed here would be admissible pursuant to Rule 611(a). In such cases, the use of summaries – be it through narrative or charts – is best saved for the [counsel's] closing argument." Id. at 1047-48; see also United States v. Harenberg, 732 F.2d 1507, 1513–14 (10th Cir. 1984) (summary-witness testimony was admissible where IRS agent

testified that summary was based upon evidence adduced at trial, he was subjected to thorough voir dire on the summary before it was introduced, and thoroughly cross-examined about his testimony after it was admitted).

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Respectfully submitted,

BY: /s/ John H. Tucker
JOHN H. TUCKER, OBA #9110
COLIN H. TUCKER, OBA #16325
THERESA NOBLE HILL, OBA #19119
RHODES, HIERONYMUS, JONES, TUCKER & GABLE, PLLC
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
(918) 582-1173
(918) 592-3390 Facsimile
-and-
DELMAR R. EHRICH
BRUCE JONES
KRISANN C. KLEIBACKER LEE
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 766-7000
(612) 766-1600 Facsimile
ATTORNEYS FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION LLC

BY: /s/ Michael Bond
(SIGNED BY FILING ATTORNEY WITH PERMISSION)

MICHAEL BOND, AR Bar No. 2003114
ERIN WALKER THOMPSON, AR Bar No. 2005250
DUSTIN DARST, AR Bar No. 2008141
KUTAK ROCK LLP
234 East Millsap Road Suite 400
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007
-and-
STEPHEN L. JANTZEN, OBA No. 16247
PATRICK M. RYAN, OBA No. 7864
PAULA M. BUCHWALD, OBA No. 20464
RYAN, WHALEY & COLDIRON, P.C.
119 N. Robinson
900 Robinson Renaissance
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766
E-Mail: sjantzen@ryanwhaley.com
-and-
THOMAS C. GREEN
MARK D. HOPSON
TIMOTHY K. WEBSTER
JAY T. JORGENSEN
GORDON D. TODD
CARA R. VIGLUCCI LOPEZ
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202)736-8711
-and-
ERIK J. IVES
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL, 60603
Telephone: (312) 853-7067
Facsimile: (312) 853-7036
ATTORNEYS FOR TYSON FOODS, INC.; TYSON POULTRY, INC.; TYSON CHICKEN, INC; AND COBB-VANTRESS, INC.

BY: /s/ A. Scott McDaniel
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
A. SCOTT MCDANIEL, OBA 16460
NICOLE LONGWELL, OBA 18771
PHILIP D. HIXON, OBA 19121
McDaniel, Hixon, Longwell & Acord, PLLC
320 S. Boston Avenue, Suite 700
Tulsa, OK 74103
-and-
SHERRY P. BARTLEY, AR BAR #79009
MITCHELL WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
ATTORNEYS FOR PETERSON FARMS, INC.

BY: /s/ Randall E. Rose
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
RANDALL E. ROSE, OBA #7753
GEORGE W. OWENS, ESQ.
OWENS LAW FIRM, P.C.
234 W. 13 Street
Tulsa, OK 74119
-and-
JAMES MARTIN GRAVES, ESQ.
GARY V. WEEKS, ESQ.
WOODY BASSETT, ESQ.
VINCENT O. CHADICK, ESQ.
K.C. DUPPS TUCKER, ESQ.
BASSETT LAW FIRM
POB 3618
Fayetteville, AR 72702-3618
ATTORNEYS FOR GEORGE'S, INC. AND GEORGE'S FARMS, INC.

BY: /s/John R. Elrod
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
JOHN R. ELROD
VICKI BRONSON, OBA #20574
BRUCE WAYNE FREEMAN
CONNER & WINTERS, L.L.P.
100 W. Central Street, Suite 200
Fayetteville, AR 72701
ATTORNEYS FOR SIMMONS FOODS, INC.

BY: /s/ Robert P. Redemann
(SIGNED BY FILING ATTORNEY WITH PERMISSION)
ROBERT P. REDEMANN, OBA #7454
WILLIAM D. PERRINE, OBA #11955
LAWRENCE W. ZERINGUE, ESQ.
DAVID C. SENGER, OBA #18830
GREGORY A. MUEGGENBORG, OBA #7454
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710
-and-
ROBERT E. SANDERS
STEPHEN WILLIAMS
YOUNG, WILLIAMS, HENDERSON & FUSILIER
Post Office Box 23059
Jackson, MS 39225-3059
ATTORNEYS FOR CAL-MAINE FOODS, INC.

CERTIFICATE OF SERVICE

I certify that on the 12th day of October, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and a true and correct copy of the foregoing was sent via separate email to the following:

W. A. Drew Edmondson, Attorney General — drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General — kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General — trevor_hammons@oag.state.ok.us
Daniel Lennington, Assistant Attorney General — Daniel.lennington@oag.ok.gov

Melvin David Riggs — driggs@riggsabney.com
Joseph P. Lennart — jlennart@riggsabney.com
Richard T. Garren — rgarren@riggsabney.com
Sharon K. Weaver — sweaver@riggsabney.com
Robert Allen Nance — rnance@riggsabney.com
Dorothy Sharon Gentry — sgentry@riggsabney.com
David P. Page — dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis, P.C.

Louis W. Bullock — lbullock@mkblaw.net
J. Randall Miller — rmiller@mkblaw.net
Miller Keffer & Bullock Pedigo LLC

William H. Narwold — bnarwold@motleyrice.com
Frederick C. Baker — fbaker@motleyrice.com
Lee M. Heath — lheath@motleyrice.com
Elizabeth Claire Xidis — cxidis@motleyrice.com
Fidelma L Fitzpatrick — ffitzpatrick@motleyrice.com
Mathew P. Jasinski — mjasinski@motleyrice.com
Motley Rice LLC
COUNSEL FOR PLAINTIFFS

A. Diane Hammons — diane-hammons@cherokee.org
Attorney General, Cherokee Nation
Sara E. Hill — sara-hill@cherokee.org
COUNSEL FOR INTERVENER, CHEROKEE NATION

R. Thomas Lay — rtl@kiralaw.com
Kerr, Irvine, Rhodes & Ables

Jennifer S. Griffin — jgriffin@lathropgage.com
Lathrop & Gage, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

Michael D. Graves mgraves@hallestill.com
Dale Kenyon Williams, Jr. kwilliams@hallestill.com
COUNSEL FOR CERTAIN POULTRY GROWERS

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

Thomas C. Green
Sidley Austin Brown & Wood LLP
1501 K Street NW
Washington, DC 20005
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

s/ John H. Tucker

fb.us.4481823.03